UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

AKSHAY AIYER,

Defendant.

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New York, N.Y.

18 Cr. 333(JGK)

Conference

September 24, 2019
1:40 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

U.S. DEPARTMENT OF JUSTICE
Antitrust Division
BY: KEVIN B. HART
DAVID CHU
KATHERINE J. CALLE

WILLKIE FARR & GALLAGHER LLP
Attorneys for Defendant
BY: MARTIN B. KLOTZ
JOCELYN M. SHER
JOSEPH T. BAIO
SAMUEL M. KALAR

(Case called)

THE DEPUTY CLERK: Parties state who they are for the record.

MR. HART: Good afternoon, your Honor. For the United States, it is Kevin Hart, David Chu, and Katherine Calle.

THE COURT: Good afternoon.

MR. KLOTZ: Good afternoon, your Honor. For Mr. Aiyer, Martin Klotz, Jocelyn Sher, Mr. Aiyer is seated in the middle, Joseph Baio, and Samuel Kalar.

THE COURT: Okay. Good afternoon, all. Thank you all for accommodating the slightly revised schedule.

Let me start with the government's motions *in limine*. There are nine motions *in limine*.

First, the government seeks to introduce evidence of the defendant's compensation and that of his alleged coconspirators as evidence of motive. The parties agree that the defendant's compensation and that of his alleged coconspirators consisted of a base salary and a bonus that was linked to performance because the conspiracy allegedly increased trading profits and the net income of the defendant's employer. The government argues that the defendant's actual compensation and that of his coconspirators is direct evidence of motive. The defendant does not object to evidence of the way in which his compensation was calculated, but does object to any evidence of the amount of his compensation as

insufficiently relevant and unfairly prejudicial under Federal Rules of Evidence 401 and 403.

Based on the parties' proffers to date, the government's motion is denied without prejudice to any proffer at trial of the specific amount of bonus that could be tied to the net profit to the defendant's employer from the alleged illegal trading profits. Thus far, no such proffer has been made, but the government should not seek to refer to any such evidence or make any argument based on the specific amount of the bonus without raising the issue with the court outside the presence of the jury. Without prior court approval, the government should not introduce any evidence of the specific amounts of the defendant's compensation -- either the salary or bonus components -- although the government can introduce evidence of the manner in which the compensation and that of his coconspirators was calculated. That is a point that the defendant does not object to.

Based on the proffers, the defendant was earning in excess of $1 million before the alleged conspiracy began and his actual compensation declined in a couple of the years of the alleged conspiracy. The amount of the net profit to his employer from trades that were affected by the conspiracy was relatively small compared to the trading profits that the defendant obtained from trades that were not alleged to be part of the conspiracy. In the cases cited by the government in

which specific amounts evidence was admitted, there was a much closer connection between the alleged crime and what the defendant stood to gain in income from the alleged criminal activities than exists in this case. *See United States v. Quattrone*, 441 F.3d 153, 187 (2d Cir. 2006); *United States v. Logan*, 250 F.3d 350, 369 (6th Cir. 2001); *United States v. Peake*, 143 F.Supp.3d 1, 18 (D.P.R. 2013). Given the facts, the amount of the bonus, and the total compensation would be insufficiently relevant and any relevance would be outweighed by the danger of unfair prejudice.

Second, the government seeks to admit the testimony of alleged coconspirators interpreting statements in conversations in which they were participants, as well as statements in conversations in which they were not participants, including the meaning of statements made by the defendant in these conversations. The defendant objects to the entire motion on the grounds that the government has failed to elicit a sufficient foundation for the testimony it seeks to admit and urges that the motion should be denied under Federal Rule of Evidence 701.

It is plain that participants to a conversation should be allowed to provide the jury with their understanding of the conversation, particularly when the conversation includes jargon and code words. *See generally United States v. Yanotti*, 541 F.3d 112, 126 (2d Cir. 2008) ("Individuals engaging in

illicit activity rarely describe their transactions in an open or transparent manner, and the government may call witnesses to provide insight into coded language through lay opinion testimony."). The foundation is established by the witness's participation in the conversation and the witness's testimony about the basis for the witness's understanding of the terms that were used. *See United States v. Rubin/Chambers, Dunhill Insurance Services*, 828 F.Supp.2d 698, 703 (S.D.N.Y. 2011). ("Accordingly, a proper foundation will be readily established where the witness was a participant in the conversation.").

The government should therefore attempt to establish at trial the foundation for the testimony of the participants to the conversations in which the participants participated as to the meaning of various words and phrases in the conversation. *See id.*

Similarly, while the government did not provide specific examples, the government should be allowed to lay the foundation at trial for coconspirators to explain the meaning of jargon used in conversations in furtherance of the alleged conspiracy of which they were members even if they did not participate in the specific conversations. *See id.* at 703. ("Therefore, if the government establishes that a witness's participation in the alleged conspiracy informed the witness's knowledge about the contents of the recorded conversation, the personal knowledge requirement of Federal Rule of Evidence 701

may be satisfied even as to conversations in which the witness did not participate."); *see also Yanotti*, 541 F.3d at 126 n.8 ("An undercover agent whose infiltration of a criminal scheme has afforded him particular perceptions of the methods of operation may offer helpful lay opinion testimony under Rule 701 even as to coconspirators' actions that he did not witness directly.").

Two cautions are appropriate:

First, the testimony about the meaning of the terms used in the conversations must be helpful to the jury under Rule 701. Simply repeating what is in the conversations or attempting to interpret conversations that are plain on their face would not be helpful to the jury under Federal Rule of Evidence 701(b). But to the extent the conversations use jargon or are not understandable to a lay juror, the testimony about the meaning of the conversations would be helpful to the jury.

Second, as the defense points out, to the extent that the government seeks to admit testimony about what the defendant meant in conversations, that testimony runs the risk of having a witness testify about the defendant's state of mind, which would impermissibly infringe upon the province of the jury. *See, e.g., United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004) ("The agent interpreted both the calls that the jury heard and the calls that the jury does not hear. In

doing so, he usurped the function of the jury to decide what to infer from the content of the calls."); *Munoz v. United States* No. 07-cv-2080, 2008 WL 294861 at *19 (E.D.N.Y. July 28, 2008. ("Opinion testimony is not helpful to the jury in determining facts when it attempts to usurp the jury's role by dictating the inferences the jury should draw from the objective facts of the case."). As Judge Marrero helpfully explained, "The government should be mindful to avoid inviting the witnesses to instruct the jury regarding their conclusions as to the defendant's state of mind." *Rubin/Chambers*, 828 F.Supp.2d at 705.

It is apparent from the examples provide by the government that there are conversations that include financial jargon that would be difficult to understand without a lay participant in the alleged conspiracy explaining what was going on in the conversations based on the lay witness's background in the conspiracy and participation in similar conversations. Therefore, presuming that the government lays the proper foundation at trial, witnesses should be permitted to testify about their understanding of such conversations in which they participated. And, similarly, providing that there is a sufficient foundation, such participants in the alleged conspiracy should be permitted to interpret conversations allegedly in furtherance of the conspiracy in which they did not participate. To that extent, the government's motion is

granted without prejudice to the ability of the defendant to object at trial if a proper foundation has not been laid at trial.

Third, the parties are in agreement that the parties should not refer to any punishment or sentence that may result from conviction because it is irrelevant. The issue of punishment is for the court alone. The parties also agree that the parties should not refer to the immigration consequences of any conviction. The defendant therefore suggests that the court deny the motion as moot. *See United States v. Walia*, No. 14-cr-213, 2014 WL 3734522 at *4 (E.D.N.Y. July 25, 2014) ("As the parties agree that it would be improper for the jury to consider the potential punishment and immigration consequences of a conviction in this case, the portion of the government's motion seeking to preclude such evidence or argument is denied as moot."). However, the papers raise an issue as to whether any evidence relating to the defendant's status in the United States as a green card holder may be relevant, particularly because there are some references in the transcripts to the defendant's relationship with his employer and the significance of that relationship to his status as a green card holder. The defense points out that this is separate from the immigration consequences of any conviction. *See id.* ("To the extent the government is seeking to preclude any mention of the defendant's immigration status during trial, the court reserves

decision on this issue in light of the defendant's position that his immigration status directly rebuts the anticipated arguments by the government.").

It is plain that the parties should not refer to punishment or any possible consequences of punishment from a conviction, including immigration consequences. Before introducing any evidence with respect to the defendant's immigration status in the United States, the parties should raise the issue outside the presence of the jury before referring to the evidence before the jury. The parties will then have the opportunity to explain the relevance of that evidence and the possible consequences of seeking to introduce it.

Next, the government argues that the defendant should not be entitled to introduce evidence of industry custom or practice or supervisor knowledge to argue that the defendant did not have the requisite intent. The government argues that such evidence is irrelevant because the defendant is accused of *per se* violations of the Sherman Act, namely, price fixing and bid rigging. To prove *per se* violations of the Sherman Act, the government must prove that the defendant entered into a conspiracy to fix prices or rig bids as alleged in the indictment. *See United States v. Koppers Co., Inc.*, 652 F.2d 290, 295 n.6 (2d Cir. 1981). The specific intent that is required is the intent to enter into the conspiracy to fix

prices or rig bids. The government fears that the defendant will use evidence of industry custom or practice and supervisor knowledge to substantiate a "good faith" argument, which is not a defense, or an "everyone does it" argument, which is also not a defense. Thus, in a *per se* case, evidence that goes to the specific intent of the defendant to harm competition is inadmissible because it is irrelevant. *See United States v. Stop & Shop Companies, Inc.*, Crim. No. B 84-51, 1984 WL 3196 at *1 (D. Conn Nov. 9, 1984) (Cabranes J.) (denying a motion *in limine* and thereby excluding evidence of economic justification). For good reason, the defendant disclaims both arguments and notes that the court could give limiting instructions that those arguments are not proper and could prevent the defendant from making any such arguments, which, in any event, the defendant disclaims any intent to make.

However, the defendant proffers legitimate reasons for offering arguments of industry custom and practice and supervisor knowledge. For example, the defendant explains that some of the government's evidence will touch on practices that are not in fact bid rigging or price fixing, including information sharing. *See SourceOne Dental, Inc., v. Patterson Companies, Inc.*, 310 F.Supp.3d 346, 363 (E.D.N.Y. 2018). ("Information sharing is not a *per se* violation of the Sherman Act, but courts have recognized the claim under the Rule of reason."). The defendant is correct that he should be given

the opportunity to explain that these possibly suspicious practices are the benign practices the defense claims them to be. *See United States v. Usher*, No. 17-cr-19 (S.D.N.Y. Sept. 28, 2018), ECF No. 158, at page 33. ("We don't want to infringe on the defense, who's got a lot at stake here, ability to rebut the elements of the crime with which each defendant is charged." Moreover, supervisor knowledge would be relevant at the very least to counter the government's argument that the defendant deliberately concealed his activity because he knew it was unlawful. *See id.* at page 33. ("I am acutely aware that the defense, although it doesn't have to present a case, though, should be given the appropriate latitude to refute the government's case.").

Therefore, the motion is granted to the extent that the defendants cannot put forward a "good faith" or "everyone does it" defense, but the motion is otherwise denied. To the extent that the motion is denied, it is denied without prejudice to a showing at trial by the government that any specific evidence can have no other purpose than to support a "good faith" or "everyone does it" defense.

Next, the government moves to exclude any argument or evidence of the lack of anticompetitive effects of the alleged bid rigging or price fixing. The government argues correctly that if the transactions that the alleged coconspirators entered into were in furtherance of a horizontal conspiracy to

fix prices or rig bids, then evidence of the lack of anticompetitive effects would be irrelevant because price fixing and bid rigging are *per se* illegal. *See United States v. Guillory*, 740 F.App'x 555, 556 (9th Cir. 2018). ("The district court did not preclude any relevant evidence by granting the government's motion *in limine* to prohibit *Guillory* from introducing evidence or argument that the bid-rigging agreements were reasonable. Bid rigging is a *per se* violation of the Sherman Act.") (quotations and alterations omitted).

The defense responds that some transactions are difficult to characterize as *per se* illegal. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 9 (1979) ("It is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label *'per se* price fixing.' That will often, but not always, be a simple matter.") (collecting cases). In ruling on the defendant's motion to dismiss the indictment for failure to state a criminal violation of the Sherman Act, the court has already considered many of these arguments and has concluded that the allegations in the indictment are "sufficient to state a *per se* violation of the Sherman Act." Dkt. No. 66 at 43, lines 13 and 14.

In any event, as the Second Circuit Court of Appeals has noted, "the decisions falling in the *BMI* line are narrow" and are "limited to situations where the restraints on

competition are essential if the product is to be available at all." *United States v. Apple*, 791 F.3d 290, 325-26 (2d Cir. 2015) (quoting *American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 (2010)). These narrow circumstances are not present here. Whatever difficulties there may be with characterizing conduct in some instances as *per se* price fixing or not are inapposite in this case in which the government proffers that the transactions are classic bid rigging and price fixing among competitors, and the defendant has not attempted to argue, as he could not, that the price fixing here was essential to make the products at issue available at all. *See Apple*, 791 F.3d at 326 ("The Supreme Court has for nearly 100 years held that horizontal collusion to raise prices is the archetypal example of a *per se* unlawful restraint of trade.") (quoting *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *Koppers*, 652 F.2d at 294 ("In cases involving behavior such as bid rigging, which has been classified by courts as a *per se* violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'") (quoting *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (2d Cir. 1979).

Thus, if the price fixing charges are substantiated, evidence of anticompetitive effects is irrelevant or pro-competitive effects. *See In re: Publication Paper Antitrust Litigation,* 690 F.3d 51, 61 (2d Cir. 2012). ("An

agreement between competitors to fix prices, known as a horizontal price-fixing agreement, categorically constitutes an unreasonable restraint and, accordingly, is unlawful *per se*." *United States v. Marr*, No. 14-cr-00580, 2017 WL 1540815 at *5 (N.D. Cal. Apr. 28, 2017), *aff'd sub nom. United States v. Sanchez*, 760 F. App'x 533 (9th Cir. 2019). ("Because evidence of reasonableness or pro-competitive justification for bid rigging is not relevant in a *per se* case, it is not admissible under Federal Rule of Evidence 402." The categorical ban on price fixing and bid rigging follows from the determination by the Supreme Court that those practices are *per se* illegal without a consideration of their anticompetitive effects under the rule of reason. *See Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 345 (1982) ("Thirteen years later, the court could report that 'for over 40 years, this court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.'") (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)).

It is clear that the defendant should not be able to argue that the pro-competitive effects of horizontal bid rigging or price fixing make such practices legal or prevent them from being illegal. The defendant argues that the

evidence may be admissible for another purpose, such as to show the lack of intent by the defendant to enter into an agreement to fix prices or rig bids. *See Guillory*, 740 F.App'x at 556 ("Guillory remained free to argue that he lacked intent to join or participate in the conspiracy to rig bids."). But without some further explanation of the specific evidence that is at issue, it is impossible to determine whether that is a reasonable basis for the proffer of any such evidence. Indeed, neither the government nor the defense has articulated the specific evidence that is the subject of this motion.

Therefore, at this point, the motion to exclude arguments about the competitive effects of price fixing and bid rigging is granted. The motion to exclude evidence of pro-competitive effects of price fixing and bid rigging is granted without prejudice to the ability of the parties to raise the issue with respect to specific evidence at trial. Any such proffers should be made outside the presence of the jury before such evidence is offered or referred to.

Next, the government seeks to preclude the defendant from raising a "joint venture" defense pursuant to which the alleged price fixing and bid rigging were simply ancillary restraints. Without delving too deeply into the various nuances of joint ventures and the *per se* rule, it is enough for now to note a few aspects of the law in this area.

The "joint venture" defense is available when "the

pricing policy challenged amounts to little more than price setting by a single entity -- albeit within the context of a joint venture -- and not a price-fixing agreement between competing entities with respect to their competing products." *Texaco, Inc.*, v. *Dagher*, 547 U.S. 1, 6 (2006). Thus, "the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under Section 1 of the Sherman Act." *Id.* at 8. While it is true that one factor in determining the existence of a joint venture is the potential efficiency of the venture -- *see Apple*, 791 F.3d at 326 -- it is also the case that the Supreme Court's decision in *Dagher* rested on a relatively singular set of facts in which "Texaco and Shell had formed a joint venture called Equilon Enterprises, that 'was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission in order to refine and sell gasoline.'" *Iowa Public Employees' Retirement System v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 340 F.Supp.3d 285, 327 (S.D.N.Y. 2018) (quoting *Dagher*, 547 U.S. at 4). Further, it remains the case that "A and B cannot simply get around the *per se* rule by agreeing to set the price of X through a third-party intermediary or joint venture if the purpose and effect of the agreement is to raise, depress, fix, peg, or stabilize the price of X." *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 336 (2d Cir. 2008)

(Sotomayor J., concurring in the judgment).

The government argues that the categorization of an agreement as a joint venture is a matter of law and that if the defense intends to raise such a defense, the court should hold a pretrial hearing to determine if there is sufficient evidence to support the existence of a joint venture. The defense is correct that such a pretrial hearing would be immensely inefficient because the various alleged coconspirators would be required to testify. While the definition of a joint venture may be a question of law, if there are disputed issues of fact, then those factual issues would raise questions of fact for the jury. At this point, there is no proffered evidence to support a conclusion as a matter of law that a joint venture existed in this case and, in any event, whether there could be a joint venture would depend on all of the evidence adduced at trial. The defense would be seriously ill-advised to attempt to proffer a defense at trial that would be rejected by the jury or eventually precluded by the court in final instructions. Without a specific proffer of the potential evidence that is sought to be excluded, however, the court could not grant this motion *in limine*. The motion *in limine* is therefore denied without prejudice to being raised at trial particularly in connection with the proffer of any specific evidence at trial.

Next, there is no dispute between the parties that the

defendant's experts should not be permitted to opine on legal conclusions and the defendant's state of mind. Therefore, the defendant suggests that this motion should be denied as moot.

It is well established that "expert testimony that usurps either the role of the trial judge in determining the applicable law or to the role of the trier of fact in applying that law to the facts before it is inadmissible because it by definition does not aid the trier of fact in making a decision." *In re: LIBOR-Based Financial Instruments Antitrust Litigation*, 299 F.Supp.3d 430, 469 (S.D.N.Y. 2018) (citing *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005) (quotations and alterations omitted). Further, "inferences about the intent or motive of parties or others lie outside the bounds of expert testimony." *On Track Innovations Ltd. v. T-Mobile USA, Inc.*, 106 F.Supp.3d 369, 412 (S.D.N.Y. 2015) (quoting *In re: Rezulin Products Liability Litigation*, 309 F.Supp.2d 531, 547 (S.D.N.Y. 2004)).

However, these broad and uncontroversial principles do not mean that the government's motion *in limine* should be granted in this case. The specific examples that the government is concerned about are statements that Katz and the defendant were in a vertical relationship. The government contends that the defendant and Katz were in a horizontal relationship. But "horizontal relationship" and "vertical relationship" are economic terms, although they are certainly

building blocks for legal conclusions. Experts should be permitted to describe, based on their expertise, the economic relationship among the parties. That is not a legal conclusion. The defendant has foresworn having its experts testify as to legal inclusions or the motive or the intent of the defendant. That is sufficient for now. *Cf. U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers Local Union No. 3, AFL-CIO,* 313 F.Supp.2d 213, 240-41 (S.D.N.Y. 2004) (permitting an economic expert in an antitrust case to testify about factors that would tend to show anticompetitive conduct in a market while excluding expert testimony concluding that the defendant had or had not engaged in "anticompetitive conduct"). The government has not pointed to any specific legal conclusions or opinions as to the defendant's state of mind that the experts may give. Any such opinions would be excluded if and when the experts attempt to testify as to those matters. Therefore, the motion is denied without prejudice as moot. The government may raise specific objections at trial to specific aspects of the expert's testimony.

The government moves to dismiss records of statements by traders by e-mails or in chat rooms on the grounds that such records do not constitute business records under Federal Rule of Evidence 803(6) and therefore are inadmissible hearsay under Federal Rule of Evidence 801.

There is no way that the court could exclude all such communications without specific proffers as to each of the communications to determine whether the communications are being offered for the truth of the statements and are therefore hearsay unless there is an applicable exception or are not being offered for the truth of the statements, but simply for the fact that the statements were made, in which event they would not be hearsay. The defendant represents that the vast bulk of any trader communications he would seek to offer are not being offered for the truth of the statements, but simply for the fact that the statements were made. This is credible, given the paucity of the communications proffered by the government and the reasonable proffers by the defendant as to nonhearsay purposes for the statements. For example, trader communications that show that supervisors were aware of the activities of the defendant or alleged coconspirators could be used for the nonhearsay purpose of showing that the supervisors were aware of the activities challenged by the government and that the coconspirators were not attempting to conceal those activities as the government alleges. *See, e.g.*, *Hosain-Bhuiyan* v. *Barr Labs, Inc.*, No. 17-cv-114, 2019 WL 3740614 at *5 n.4 ("The content of the communications themselves are not offered for their truth, but to show the plaintiff sent such e-mail. Therefore, these portions of the report are not hearsay."*).*

The defendant also asserts that some e-mail communications may in fact be business records, for example, records of performance reviews, if a proper business records foundation can be laid. *See* Federal Rule of Evidence 803(6)(A)-(E)*; cf. Park West Radiology v. CareCore Nature, LLC,* 675 F.Supp.2d 314, 333 (S.D.N.Y. 2009) ("Employees were not under an obligation to create the e-mails as a record of regularly conducted business activity. Though an e-mail may satisfy the business records exception under appropriate circumstances, plaintiffs do not show that these e-mails qualify.").

As such, the admissibility of these records will depend on the specific proffers at trial. Documents not being offered for the truth could be admitted with an instruction that the documents are being admitted not for the truth of the contents, but for some other purpose. There will have to be a proper foundation at trial for documents be offered for the truth of the contents, whether based on the business records exception or some other exception. Documents authored by the defendant could be admitted under Federal Rule of Evidence 801(d)(2)(A) and alleged coconspirator statements could be admitted using the procedure for the admission of such statements. *See* Federal Rule of Evidence 801(d)(2)(E) and all of the necessary preliminaries with respect to the acceptance of alleged coconspirator statements which are taken subject to

connection.

Therefore, the motion to exclude all allegedly hearsay trader communications is denied without prejudice to objections being raised at trial to specific documents.

Next, the government speculates that the defendant's expert witnesses -- Professor Lyons and Professor Carlton -- will be used to transmit impermissibly hearsay communications from traders that otherwise would not be admitted in evidence. It is of course well established that "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis for his testimony." *Marvel Characters, Inc*. v. *Kirby*, 726 F.3d 119, 136 (2d Cir. 2013). However, the government does not point to any portion of the expert disclosures of Professor Lyons and Professor Carlton that in fact impermissibly communicate hearsay communication of traders. Communications by traders may not be hearsay if offered for a purpose other than the truth of the statements, such as to show that the statements were made. And while experts cannot simply be used to place hearsay statements before the jury, they may, for example, "testify to opinions based on inadmissible evidence, including hearsay if experts in the field reasonably rely on such evidence in forming their opinions." *United States v. Gatto*, No. 17-cr-686, 2019 WL 266944 at *6 (S.D.N.Y. Jan. 17, 2019) (quoting *United States v. Mejia*, 545 F.3d 197,

197 (Second Circuit 2008)); *see* Federal Rule of Evidence 703. The defendant denies any intent to use the experts for an improper purpose, and the government has failed to identify in specific terms how the expert disclosures impermissibly seek to place hearsay statements before the jury.

To the extent that the experts may be used to interpret trader communications -- and the parties have failed to point to the specific communications that might be interpreted -- the defendant says that the experts have the expertise to do so. Because no specific communications have been identified and because the defendant proffers that there is expertise to interpret such communications, there is no issue before the court at this point. If there is an objection at trial, the defendant will have to show that the expert's expertise to support the witness's testimony has been established. *See Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Next, the government argues that the witnesses should not be permitted to opine on intent and motivation. When experts "speculate as to the motivations and intentions of certain parties," they infringe upon the province of the factfinder, whose job it is to assess "witnesses' credibility and draw inferences from their testimony." *Marvel Characters*, 726 F.3d at 136. However, the defendant disclaims any intent to have the experts testify about intent and motivation, and

the government has failed to point to any portion of the experts' disclosures where the experts attempt to opine about intent and motivation.

Finally, the government argues that the expert testimony of Professors Carlton and Lyons will be redundant on the discussion of general market dynamics and therefore, under the prohibition of cumulative testimony, only one of the two experts should be permitted to testify. Duplicative expert testimony can be excluded. *See Price v. Fox Entertainment Group, Inc.*, 499 F.Supp.2d 382, 390 (S.D.N.Y. 2007). However, when experts differ either as to their qualifications or their perspective, the testimony is not cumulative simply because they will cover the same topic. *See Royal Bahamian Association, Inc., v. QBE Insurance Corp.*, No. 10-21511-CIV, 2010 WL 4225947 at *2 (S.D. Fla. Oct. 21, 2010).

A careful review of the disclosures made by Professors Lyons and Carlton show that their testimony will not be unduly duplicative. Professor Lyons researches in the area of foreign exchange microstructure. He will testify about foreign exchange markets and the types of users and parties who participate in these markets, and his affidavit demonstrates that his focus will be on the internal dynamics of foreign exchange markets. Lyons Aff. at 1-4. Professor Carlton researches in the area of industrial organization economics. In contrast to Professor Lyons, Professor Carlton intends to

testify on the external market effects of the conduct at issue in this case carried out by the defendant and his coconspirators. Carlton Aff. at 1-8. It may be possible that discrete aspects of the testimony by Professor Lyons and Professor Carlton may be duplicative at trial, and if testimony is adduced that is unduly cumulative, the government may make an appropriate objection at the appropriate time. However, it cannot be said at this point that the two experts will testify in such substantially similar ways that only one expert may testify at the outset.

Therefore, the motion *in limine* is denied without prejudice to any arguments for exclusion or any specific portions of the expert's testimony if a proper foundation is not laid at trial.

The government's motions *in limine* are decided as explained above.

We turn now to the defendant's motions *in limine*. First, the defendant moves to exclude the expert testimony of Ross Waller and Dr. David DeRosa on the grounds that there is insufficient disclosure of their expert testimony. Does the defendant still press that motion? Because there were subsequent disclosures by the government, including a prior transcript of the testimony.

MR. KLOTZ: Yes. Judge, I don't think we press the motion at this point.

THE COURT: Okay.

MR. KLOTZ: I'm in a position where I honestly don't know whether -- I think I know what these witnesses are going to testify, and if they testify what I think they are going to testify, then I probably don't have a problem with it. My concern is, I'm not sure if they are going to go beyond that and to the extent they do, I have no disclosure. But I would say for now I don't ask your Honor to rule on it except with respect to the narrow carveout of testimony about fictitious trades.

THE COURT: I'm sorry?

MR. KLOTZ: Except with respect to the narrow carveout of Professor DeRosa's testimony about the purpose of fictitious trades or canceled trades.

THE COURT: Okay. First of all, I take it that the government has provided expert disclosure with respect to both of the witnesses and a transcript of what DeRosa testified to in the *Usher* case, and the expert testimony will obviously be governed, restricted by the disclosure that the government has made as to what the nature and scope of those expert witnesses will testify to. So if the expert witnesses go beyond the disclosure, the defense can raise an objection at trial.

So the one objection that the defendant wants me to rule on is the defendant objects to any testimony about fictitious and wash sales by Dr. DeRosa. The government

offered to eliminate that topic from Dr. DeRosa's testimony on fictitious and wash sales if the defense experts also did not testify about that subject. The defense declined the invitation.

Because that is a subject that may arise at trial and because the jury may be unfamiliar with the terms, an industry expert should be permitted to explain the terms and their use in the industry. As I understand from the government papers, Dr. DeRosa is not being proffered as a witness to testify about specific transactions in this case, but he certainly should be allowed to testify about the meaning of terms such as "wash sales," particularly since the defendant has not foresworn having his experts testify about the subject.

So the motion to exclude the testimony of the two government experts is withdrawn except with respect to the issue of fictitious and wash sales, as to which the motion is denied.

The defense moves to exclude any evidence of bank compliance policies, specifically those relating to prohibitions against antitrust violations and most particularly against price fixing and bid rigging and any evidence of the defendant's termination for misconduct. The defense argues that the policies are irrelevant and prejudicial because, among other reasons, the issues in this case are whether the government has proved beyond a reasonable doubt that the

defendant entered into a conspiracy in violation of the Sherman Act to fix prices and rig bids and not whether the defendant violated his bank policies or whether alleged coconspirators violated their bank policies. *See* Federal Rule of Evidence 401-403. The government agrees and states that it does not intend to offer such evidence unless the defendant opens the door to such evidence in the opening statement, through cross-examination, or in its direct case, by arguing that what the defendant did was standard industry practice or that his supervisors were well aware of what the defendant was doing.

Therefore, the motion to exclude this evidence is denied as moot at this point. If the defense raises arguments as to which this evidence is responsive and relevant, the court will then have to make the necessary findings as to the relevance of the evidence and the Rule 403 balancing analysis. Plainly, the evidence should not be referred to until the court has determined that it can be admitted.

The defendant moves to exclude any argument or evidence concerning spoofing -- making bids or offers that the maker had no intent to complete -- or canceled trades. The defendant argues that these practices are not unlawful for foreign exchange traders, are irrelevant and unfairly prejudicial. The government responds that these practices are integral to the story of the antitrust conspiracy to fix prices and rig bids. They were used on some occasions to facilitate

bid rigging and price fixing and on other occasions showed the course of dealing among the conspirators that showed their trust and confidence in each other. Therefore, the transactions are necessary to complete the description of the course of the conspiracy. There is plainly a sufficient showing of the relevance of these transactions. There is also no need to subject such evidence to analysis under Rule 404(b) because the evidence is "inextricably intertwined with the evidence regarding the charged offenses, and it is necessary to complete the story of the crime on trial." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (quoting *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997).

Moreover, there is no basis to exclude the evidence under Rule 403. The evidence is not unduly prejudicial. It is not an appeal to passion or an appeal to have the jury decide the issues in this case on an impermissible basis. *See, e.g.*, *United States v. Morgan*, 786 F.3d, 227, 232-33 (2d Cir. 2015). The transactions are no more inflammatory than the transactions for which the defendant was indicted and perhaps less so. Any possible prejudice is substantially outweighed by the relevance of the evidence. Just as in *Usher*, the motion to exclude this evidence is denied. 17-cr-19, Dkt. No. 158, at 87:1-6. If the defendant wishes, the court will give the limiting instructions suggested by the government at page 10 of its brief or any reasonable instructions suggested by the defendant.

Next, the defendant acknowledges that there is no basis at this time to exclude evidence of coordinated trading in the interdealer market or coordinated ruble pricing between the defendant and alleged coconspirator Katz. But the defendant hopes that this evidence at trial will convince the court that this evidence should be excluded. The government maintains that this evidence is direct evidence of the conspiracy to fix prices and rig bids. Therefore, the motion must be denied at this time. The defense is of course free to raise any arguments it wishes in the course of the trial, but the argumentation in the present motion does not presage much success for any renewed motion. In particular, the defense again argues that there were pro-competitive purposes for the defendant's conduct. But if, as alleged, the defendant engaged in a conspiracy to fix prices or to rig bids, then the pro-competitive effects are not relevant. Bid rigging and price fixing are *per se* violations of the Sherman Act despite any individual's belief that such practice are a good idea because they are in fact pro-competitive. *See In re: Publication Paper Antitrust Litigation, 690* F.3d 51, 61 (2d Cir. 2012*); United States v. Koppers Co., Inc.*, 652 F.2d 290, 295 n.6 (2d Cir. 1981). ("Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient. A requirement that the intent go further and envision actual anticompetitive results would reopen the very

questions of reasonableness which the *per se* rule is designed to avoid."); *United States v. Marr*, No. 14 Cr. 580, 2017 WL 1540815 at *5 (N.D. Cal. Apr. 28, 2017), *aff'd sub nom. United States v. Sanchez*, 760 F.App'x (9th Cir. 2019) ("Evidence of reasonableness or pro-competitive justification for bid rigging is not relevant in a *per se* case.").

The motion is denied at this time.

The defendant's motions *in limine* are decided as explained above.

Next there is a defendant's motion under *Brady*. There are two pretrial motions filed by the defendant concerning issues under Federal Rule of Criminal Procedure 17(c) and *Brady*.

The defendant has moved under Federal Rule of Criminal Procedure 17(c) for a subpoena to issue compelling cooperating witness Nicholas Williams to produce documents prior to trial relating to Mr. Williams' interviews with South African regulators.

Is this motion still active?

MR. KLOTZ: It is, your Honor.

THE COURT: Okay.

MR. KLOTZ: We ask that your Honor issue the subpoena. Obviously, Mr. Williams' attorney is not present, and I have no doubt that she has views on this. But we would still ask your Honor to issue the subpoena so we can tee the issue up.

THE COURT: Right.

The government opposed. The government filed its opposition, and I don't recall that Williams was heard on the motion. I think it was the government as an interested party.

MR. KLOTZ: Correct. I think the government has opposed it, and I think we gave our views of the government's position, and your Honor has, I think, complete briefing on that issue.

THE COURT: Okay.

So the defendant has moved under Federal Rule of Criminal Procedure 17(c) for a subpoena to issue compelling cooperating witness Nicholas Williams to produce documents prior to trial relating to Mr. Williams' interviews with South African regulators.

As a threshold matter, the government has standing to challenge the issuance of the subpoena even though the subpoena would be served on an nonparty, Mr. Williams, and the defendant does not challenge that standing. *See, e.g.*, *United States v. Carton*, No. 17-cr-680, 2018 WL 5818107 at *2 (S.D.N.Y. Oct. 19, 2018); *United States v. Vasquez* 258 F.R.D. 68, 71-72 (E.D.N.Y. 2009). Moreover, the court has an independent responsibility to ensure that subpoenas issue for a proper purpose and comply with Rule 17(c) regardless of the government's standing. *See United States v. Weissman*, No. 01-Cr-529, 2002 WL 31875410 at *1 n.1 (S.D.N.Y. Dec. 26, 2002).

Parties in a criminal case may issue subpoenas that "order the witness to produce any books, papers, documents, data, or other objects the subpoena designates." Federal Rule of Criminal Procedure 17(c)(1). Courts may quash or modify a subpoena "if compliance would be unreasonable or oppressive." Federal Rule of Criminal Procedure 17(c)(2). When the documents are to be produced prior to trial, the Supreme Court has adopted the four-part test set out by Judge Weinfeld in *United States v. Iozia* 13 F.R.D. 335, 338 (S.D.N.Y. 1952), to determine whether the subpoena complies with Rule 17. The moving party must show:

"(1) that the documents are evidentiary and relevant;

"(2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;

"(3) that the parties cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and

"(4) that the application is made in good faith and is not intended as a general fishing expedition."

*United States v. Nixon*, 418 U.S. 683, 699-700 (1974). The defendant's request fails because the documents it seeks are not "evidentiary and relevant" within the mean of Rule 17(c).

Specifically, evidence produced through Rule 17(c) must be admissible at the time the subpoena issues.

Impeachment evidence, which may be admissible at trial only if and when the witness testifies, is not subject to pretrial production under Rule 17(c) because it is not admissible until the pertinent witness testifies. *See Nixon*, 418 U.S. at 701 ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." *United States v. Cherry*, 876 F.Supp. 547, 553 (S.D.N.Y. 1995) ("Documents are not evidentiary for Rule 17(c) purposes if their use is limited to impeachment.").

The defendant acknowledges that Rule 17(c) may not be used to obtain impeachment evidence, but argues that Mr. Williams' communications with South African regulators are admissible to demonstrate to the jury his bias or motivation because of his decision to cooperate with the government. The defendant also argues that Mr. Williams' statements may exculpate Mr. Williams, thereby portraying his behavior, and by extension the defendant's, as legitimate. In his supplemental letter dated July 1, 2019, the defendant drew the court's attention to what he claimed was an example of such an exculpatory statement, which was Mr. Williams' failure to say that there was an "agreement" among the alleged coconspirators.

In support of his argument, the defendant cites three cases in which courts within this district have permitted Rule 17(c) subpoenas to issue to obtain evidence that purported to establish the bias of the witness. *See United States v.*

*Seabrook*, No. 16-cr-467, 2017 WL 4838311 (S.D.N.Y. Oct. 23, 2017); *United States v. Zhu*, No. 13-cr-761, 2014 WL 5366107 (S.D.N.Y. Oct. 14, 2014); *United States v. Carollo*, No. 10-cr-654, 2012 WL 1195194 (S.D.N.Y. Apr. 9, 2012).

However, as the government correctly points out, in *Seabrook*, *Zhu* and *Carollo*, the evidence of bias was independent of the prospective trial testimony. In *Seabrook*, the defendant sought documents that were collateral to the cooperating witness's statements to the government. *Seabrook*, 2017 WL 4838311 at *3. In *Zhu*, the defendant sought communications between the New York University Medical Center and Siemens that would tend to show that the New York University Medical Center was biased towards the defendant when it urged the United States to pursue criminal charges against the defendant. *Zhu* 2014 WL 5366107 at *5. In *Carollo*, the defendants sought bank records and tax returns from a cooperating witness, an unindicted coconspirator, that would tend to show bias on the part of the witness prior to and during the period of cooperation. *Carollo*, 2012 WL 1195194 at *2.

In contrast, the defendant seeks communications between Mr. Williams and the South African regulators as well as documentation surrounding those communications. This material is not collateral to Mr. Williams' supposed trial testimony, but simply constitutes statements of the potential witness that the defense speculates may be inconsistent with

his trial testimony. For example, evidence of Mr. Williams' failure to state that there was an "agreement" among the alleged coconspirators will be admissible, if at all, only if it is inconsistent with Mr. Williams' trial testimony. Mr. Williams' statements about an agreement or lack thereof among alleged coconspirators is not probative of any bias or motive on Mr. Williams' part.

Therefore, the requested documents are not within the scope of a Rule 17(c) pretrial subpoena. When and if Mr. Williams testifies at trial, the defense can renew a subpoena for materials that may be admissible at trial.

Separately, the government argues that Rule 17(h) bars the defendant's requested subpoena insofar as the defendant requests a statement of a witness or a prospective witness. However, Rule 17(h) and corresponding Rule 26.2 do not apply to documents that are not in the possession of the government or the defendant. Rather, the rules apply to situations in which a party seeks to compel "any statement of the witness that is in the possession of an attorney for the government or the defendant and that relates to the subject matter of the witness's testimony." Federal Rule of Criminal Procedure 26.2(a) see *United States v. Hosain*, No. 16-cr-462-CRB, 2018 WL 1091083 at *2 (N.D. Cal. February 28, 2018) ("The advisory committee's notes to the amendments adding Rule 17(h) reflect an intention to make the rules coherent, not to change them.

That is, they do not reflect an intention to make third-party witnesses undiscoverable."). In this case, the government denies that it is in possession of these documents. Therefore, Rule 17(h) is not an independent basis to exclude the production of the documents.

The defendant has also moved under *Brady v. Maryland*, 373 U.S. 83 (1963), to compel the government to identify lists of exhibits shown during all reverse proffers made in connection with this case. Specifically, the defendant requests the exhibits shown during reverse proffers with Mr. Cummins, although the defendant's request includes "reverse proffers with any persons or entities referenced in the indictment or counsel for such persons or entities." Dkt. No. 72. The government represents that it has already produced all such documents, including the final plea agreement with Mr. Cummins, Mr. Cummins' proffers letters, Mr. Cummins' interview memoranda from before and after the reverse proffer, and the notes and information relating to proffers made by Mr. Cummins' counsel. Nevertheless, the defendant seeks a list of the exhibits shown to Mr. Cummins and potential targets of the government's investigations in order to convince the targets to plead guilty or cooperate.

*Brady* requires the production of evidence favorable to the accused, but it is difficult to see how the government's selection of exhibits to show potential witnesses that may

implicate those witnesses is evidence that is favorable to the defendant. There is no case where the government's selection of documents to show a potentially cooperating witness has been found to be covered by *Brady*. Moreover, the exhibits themselves have already been produced to the defendants and are readily searchable. The government has produced all of the communications with the cooperating witnesses, including any proffer agreements and cooperation agreements, and will produce all prior statements by the witnesses on the schedule previously set by the court.

The government represents that it has complied with its *Brady* obligations and will continue to do so. That is sufficient. *See, e.g.*, *United States v. Mohamed*, 148 F.Supp.3d 232, 246 (E.D.N.Y. 2015) (collecting cases demonstrating that *Brady* is satisfied when the government represents that it will comply with its *Brady* obligations and the defense provides no reason to suspect otherwise).

The defendant's motion for the issuance of a Rule 17(c) subpoena is denied. The defense motion to compel the identification of reverse proffer exhibits is also denied.

Then there is a random motion by the government to exclude the testimony of George Dowd, which Mr. Dowd was designated late, but the defendant says it was not so easy to find the expert and, when it finally found him, it identified him.

The government now moves to preclude the potential expert testimony of George T. Dowd, III, who the defendant proffers as an expert in industry customs and practices. The government argues that the expert disclosure is untimely and that the testimony should be exclude as irrelevant or that, at the very least, the court should hold a *Daubert* hearing before the testimony.

First, the court will not exclude the potential testimony as untimely. The scheduling order provided that the parties will exchange "preliminary" lists of witnesses by June 28, 2019. The final list of witnesses was to be produced on September 23, 2019, yesterday. The government points to the fact that the deadline for motions *in limine* was July 26, 2019, but that deadline would not preclude a motion that could not have been made prior to that time. Indeed, as the defendant itself writes in its response to the government's letter motion (ECF No. 111), "We have advised the government that, because of the timing of our disclosure, we do not object to their supplementing their already-filed motion *in limine* or their filing of a new motion challenging Mr. Dowd's testimony." In any event, preclusion is a drastic remedy, and the disclosure of a potential witness on the subject of custom and practice about two months before the scheduled trial date is not prejudicial to the government. *See Softel, Inc. v. Dragon Medical & Scientific Communications, Inc.*, 118 F.3d 955, 961-63

(2d Cir. 1997); *United States v. Raniere*, 384 F.Supp.3d 282, 327 (E.D.N.Y. 2019) ("But the defendant has not shown that the extreme remedy of preclusion is warranted here, where the government disclosed two experts and disclosed the topic of its third expert testimony nearly two months before the trial."). There is ample time to prepare for that testimony and to make any appropriate motions directed to that witness, particularly because the witness would only testify in the defense case.

Second, the government argues that the witness should be precluded because his testimony will simply support an impermissible defense of "everyone does it" or an impermissible argument that the advantages of price fixing or bid rigging can justify those practices. Those are impermissible arguments, as the court has already made clear, and which the defendants have said they are not making. However, there are plainly subjects about which this witness could testify that do not come close to making such arguments, including the prevalence of chat rooms, how chat rooms work, the common participants in those chat rooms, and the advantages of information exchanges. Therefore, a blanket exclusion of an industry practice's expert would not be appropriate any more than excluding the government's industry expert would be appropriate.

That leaves the government request for a *Daubert* hearing. But the government has failed to make a showing why there should be a *Daubert* hearing. The defense has provided a

detailed description of the testimony of Mr. Dowd. The government has failed to point to specific opinions that the government contends should be excluded on the basis of *Daubert*. The government is welcome to file a motion directed to any specific opinions by the expert and explain why, under *Daubert*, they are impermissible for some reason. It is not clear that would require a hearing any more than the motions directed to the other experts has required a *Daubert* hearing, but the government is free to make any such motion it seeks to preclude the expert from testifying about certain matters. *See United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007) ("The trial court's admission of the expert's testimony constituted an implicit determination that there was a sufficient basis for doing so. The formality of a separate hearing was not required."). Indeed, "whether to hold a separate *Daubert* hearing in advance of admitting expert testimony is within the trial court's discretion." *United States v. Ashburn*, 88 F.Supp.3d 239,243 (2d Cir. 2015). The government is free to make any motion *in limine* it wishes with respect to Mr. Dowd's testimony. Any such motion should be made within one week. Any response should be made one week thereafter.

So ordered.

You are free to make the motion *in limine*. I would simply caution against it. I don't see a basis for excluding an industry expert who is being put up to help the jury

understand industry terms, how transactions work, and the like.

I also think it would be very difficult to make a *Daubert* motion with respect to the witness because if the witness is describing industry customs and practices, it is not the kind of testimony that can be challenged because the opinions are based on an unreliable methodology or that the opinions don't flow from a reliable methodology. But you are free to make such a motion within one week.

Which brings me, then, to the last motion, which is a defense motion *in limine* to preclude the testimony of representatives of counterparties. The defense made the motion, the government responded by saying the motion is untimely, you know, that time for motions *in limine* has passed. Think about that. In fact, think about motions before you make them. What's the alternative? The defense says that, in the course of disclosures about witnesses, there are some items that prospective witnesses would testify to that should be excluded. The government says that motion is untimely, the time for motion *in limine* has passed. So if I thought that that was true or that that precluded the defense from making that motion, what's the alternative? Government calls the witnesses at trial, and the day the witnesses are going to testify, the defense gets up and says: Don't let them testify about these subjects. Not a very good way of efficiently running the trial.

I ask that evidentiary issues be brought to my attention -- and I will do this at the final pretrial conference also -- before the issues arise so that I can reasonably decide them in a reasoned way. So I accept faxes in the course of the trial, I meet with the lawyers before the trial day begins with the jury, at lunchtime, at the end of the day, and I ask that the lawyers anticipate what evidentiary issues are going to arise. I accept faxes so that you could fax me at night if issues are coming up, and I will deal with them first thing in the morning before the jury arrives and again at the end of the day. But it is actually a benefit to all concerned to raise issues as soon as possible so that they can be considered and decided. There have been an unusual number of motions *in limine* in this case, but that's been helpful because it helps to provide guidance for the trial and hopefully result in a more efficient trial.

So we have this final motion.

The defense moves to preclude testimony by representatives of counterparties in transactions in which the defendant allegedly engaged and which the government contends are examples of price fixing and bid rigging. The counterparty witnesses did not deal directly with the defendant, but the government contends that the witnesses will testify that the defendant's employer and the employers of the other members of the conspiracy were competitors so as to establish one of the

elements of a *per se* violation of the Sherman Act, namely, bid rigging or price fixing among horizontal competitors. The counterparty representatives will testify allegedly that the employers of the alleged conspirators were competitors and that the counterparties attempted to get the best bids based on price and other considerations. Some of the original interview memos pointed to by the defense suggested that these witnesses will testify about what they consider to be "ethical." The government denies any such intent to introduce testimony from employees of counterparties about what was ethical, and for good reason. The government does not seek to offer testimony about what the counterparties' -- obviously the issue in the case is not what is ethical but, rather, what is permissible or not permissible under the Sherman Act.

The government does seek to offer testimony about what the counterparties expected the employers of the defendant and the other alleged conspirators to do, such as not to share price information. The government says that that testimony would help to explain that the employers of the defendant and the counterparties were in fact competitors in a horizontal relationship, but this testimony actually appears to go too far. What the expectations of employers of the counterparties were could be based on numerous factors, including what those people thought was ethical or not ethical. It is enough for representatives of the counterparties to explain the

competitive relationship among the employers of the defendant and the other alleged coconspirators that is reflected in the practice of the counterparties, for example, shopping around for the best bids among the employers of the defendant and the coconspirators.

So given the suggested testimony that the defendants focused on, the government does not intend to offer testimony about what the counterparties thought was ethical, and the government should not elicit testimony about what the counterparties expected the employers of the defendant and the other alleged coconspirators would do. Rather, the representatives of the counterparties should testify about what in fact happened and what the counterparties did, which would reflect the fact that the counterparties viewed the employers of the defendant and the other coconspirators as competitors in the market. Clear enough?

Okay. That completes all of the motions that were before me.

MR. KLOTZ: Before we move -- I think we have a couple of other housekeeping details that we would like to raise with your Honor, but I have a couple of questions about the rulings as it relates to expert testimony, which is a central portion of the defense.

Obviously I will review the transcript of your Honor's rulings carefully. To the extent that your Honor excluded once

and for all certain areas of expert testimony, I think, in order to protect my record, I would like to make an offer of proof of what would be excluded to have a little more clarity. I also, however, think I understood your Honor to say that virtually with respect to every specific area of expert testimony you would reserve decision until trial to see if it appeared to be relevant to something that had been raised up until that point and was offered for a permissible purpose, because part of our argument is virtually all of the expert testimony, we think, goes to multiple purposes and probably has a reason to be in under any circumstances.

THE COURT: Well, I think that is fair. You can certainly isolate the specific proffers of expert testimony that you think are appropriate and that you think I have excluded, and the government can respond.

I will make a general observation, which is, after deciding various motions to dismiss and numerous motions *in limine*, I would have thought that the gist of the government's case is that there is a series of specific transactions that will demonstrate beyond a reasonable doubt that the defendant was part of a conspiracy to fix prices or rig bids on specific transactions in the market in which the defendant was and the other alleged coconspirators were operating, and some of what the government has tried to put in seems to be somewhat extraneous to that very straightforward and simple proposition.

Some of what the defendant attempts to do seems to not go directly to that direct and simple proposition. So if in fact there is a series of bids, trades, which are part of a price-fixing or bid-rigging conspiracy, evidence or comments by or testimony by experts about how really good and pro-competitive these individual transactions were in a bigger scheme of things, however you want to describe it, should not generally be allowed either because it attempts to raise impermissible defenses or because it is not relevant.

Now, I ruled on all of the motions *in limine* but was careful to say in many of them I was not directed to specific testimony or specific pieces of evidence, and therefore I couldn't decide on specific pieces of evidence. But that is the basic framework.

MR. KLOTZ: Understood and, your Honor, I don't think I disagree with you.

THE COURT: I'm sorry?

MR. KLOTZ: I said I don't think I disagree with you. I think what I want the evidence in for is to show that a substantial portion of the government's case is not *per se* price fixing or bid rigging. It just isn't.

THE COURT: I have read the papers carefully. There is nothing in the papers that directs me to that kind of evidence. It would seem that if you have two or three traders getting together on a bid or a price, you have a bid-rigging or

price-fixing conspiracy. The government is either able to prove that beyond a reasonable doubt or not.

There have been, I know, from the course of discovery, a reasonable number of specific transactions that have been isolated. Whether the government will be able to prove beyond a reasonable doubt that these various transactions were in fact price fixing or bid rigging, you know, remains to be seen. But the parties haven't alerted me to the kinds of specific evidence that on a granular level, if you will, should be either permitted or excluded other than in general, as I have tried to lay out in deciding the various motions *in limine*.

So if the next round of motions directs me more specifically, so be it. I don't know how far the pretrial motions will go. I assume that they could go to a quite granular level, but that's not usually the way in which they go. There is a reasonable number of transactions that have been identified and which would be the subject of evidence at trial. Does the defense intend to say, no, that transaction number 53 was not an example of price fixing or bid rigging?

MR. KLOTZ: I think we do. I think we --

THE COURT: Okay.

MR. KLOTZ: I think, and if I could just broadly speak to it, I think we think there are two different markets in which the actors in this case are active. With respect to dealing with customers, I completely understand your Honor's

view of what the issue is, and if competing dealers got together and agreed on prices to quote customers, that would be a really serious problem and it would not be a defense, oh, this had great benefits for the world at large or nobody was harmed or anything like that. It is very important to our defense that we contend that the interdealer market is a totally different kettle of fish, and that is what much of our expert testimony is directed to.

We also think, although I think your Honor ruled in our favor on this, that evidence of whether the relationship between our client and the other alleged members of the conspiracy with respect to ruble transactions was horizontal or vertical is quite important. But as I understand it, your Honor will entertain testimony on that subject.

THE COURT: I didn't exclude it.

MR. KLOTZ: Right. No, and I didn't mean to suggest that you said it is perfectly admissible, but it could be.

THE COURT: Okay.

MR. KLOTZ: I think I understand where we are. Thank you.

THE COURT: Okay. Anything else?

MR. CHU: Your Honor, in the spirit of fronting discovery issues or any sort of evidentiary issues before trial, we have two housekeeping matters.

The first is 26.2 statements. So these are statements

that need to be produced by the defense for their witnesses. According to the scheduling order, the government has produced the Jencks or 3500 material for total witnesses, and we did that pursuant -- I think it was yesterday, September 23. We have not received any 26.2 statements, the reciprocal statements, from the defense. Specifically, the government is concerned with respect to statements of their experts that could be in their possession.

We have discussed the matter with defense counsel. Defense counsel has raised a potential defense that such statements could be subject to work product. The government disagrees. Specifically, with respect to that portion under a Supreme Court case *United States v. Noble*, as well as *Goldberg*, and so that is just an issue.

We have not received any statements so far from 26.2. We have not received a date that we are going to get such statements. So we just, as your Honor alluded to, we want an efficient trial, and so the sooner we get the statements, the sooner we can evaluate what is there or not there would be helpful to us.

THE COURT: Okay. Mr. Klotz.

MR. KLOTZ: Yes, Judge. I have said to the government -- first of all, the scheduling order doesn't set a date for us to provide 26.2 statements. I have said to the government, if you look at the rule, they are only due after

the witness has concluded his direct testimony. I'm not going to do that. I'm going to give whatever we have well in advance and in ample time for you to review them.

I think the bigger issue is we have a disagreement about what is covered as prior statements of expert witnesses. My view is that what is covered as prior statements of expert witnesses is if they did a draft report or drafted something in their own hand or affirmed their commitment to a draft that somebody else had drafted, that would count as a prior statement and we would produce it. It is my belief that we have very little material that fits that description.

It is my understanding that the government's view of what counts as a prior statement is essentially anything the testifying witness wrote to anybody at any time that is on the subject of his testimony, and I think that is vastly intrusive in the process of preparing for trial. It is the type of material that would be clearly excluded under the civil rules. There is no provision in the criminal rules for anything other than prior statements, and honestly I have never seen anything like that in a criminal case.

THE COURT: Would you expect the government to have produced comparable statements for its witnesses?

MR. KLOTZ: No. My specific statement to the government was, I don't think this is covered and I don't think you are required to produce it either. I haven't looked at

what they did produce, to be honest. I don't think it is very much.

But this raises two issues.

One is, I think it is simply my experts are an integral part of the trial team. We are all working together to try to frame issues in a way that's comprehensible to a jury that addresses the government's argument, and I think to subject all of the back-and-forth on that subject, including presumably communications to me personally or one of my other attorneys is just not permitted. Rule 26.2, which governs prior statements of witnesses, expressly contemplates that materials protected by privilege are not required to be produced.

But this also, in addition to an issue of, I think, impropriety and overreach on the government's part, also goes to the timing question, because it is one thing to find are there prior statements of the witnesses and produce those -- that obviously can be done quite quickly -- but I have three different experts, and if I have to do an e-mail search and note search and go through document by document and try to make privilege determinations, I think that is a very time-consuming project.

I think the case the government cites is readily distinguishable. It is much narrower. It doesn't involve an expert witness. It involved a fact witness. It involves a

single document that is directly relevant to the trial proceeding.

THE COURT: What are you doing with respect to prior testimony by the witness as experts in other cases?

MR. KLOTZ: I don't think that's -- I don't think even the government contends that that's called for because it wouldn't relate directly to the testimony in this case. At least that's my understanding.

THE COURT: All right.

MR. CHU: Your Honor, may I respond?

THE COURT: Sure. Quickly. I have to leave soon.

MR. CHU: Understood, your Honor.

Simply that, as your Honor alluded to, written communications are 3500 material, such as e-mails, letters, things like that. That's obviously something that the prosecution searches their files for and turns over as a matter of course, and so that is something that we view as statements that are covered by 26.2.

MR. KLOTZ: Judge, I would request, if the government is going to press this, and as I have said, my view is that this is reciprocal and I don't expect them to produce anything that I don't propose to produce, but I would propose that we be given an opportunity to brief this because it is, in my mind, quite an important issue.

THE COURT: Yes. The parties can discuss it and if

there is a dispute, give me your memos on what you think should be produced and when. I don't want to undermine your good-faith negotiations over this issue. I would like it to be resolved. I would like to rely on the defense statements that they are not going to wait until the witness testifies on direct. Under 3500, the government has no obligation to produce prior statements until the witness has testified. If they stand on that, then a lot of stuff gets produced and we have to have a recess while the defense considers that. So the standard practice is, even though the rules say I couldn't require that, the government turns over the 3500 material reasonably in advance every trial. It differs from case to case.

With respect to the reciprocal discovery from the defendant -- and, again, I don't mean to undermine productive, cooperative disclosure -- the defendant could rest after the government has completed its case by never calling any witnesses. So there are lots of cases where the defense takes the position: We don't know, so we can't give you the materials for a witness who is going to testify because we don't know whether there is going to be a defense case until we have heard the conclusion of the government case.

So the defense talks about the experts who are going to be presented. Okay. There are always downsides as well as upsides to producing witnesses because witnesses are subject to

cross-examination. So to the extent that there is defense production before trial or before the government has concluded its case, the government is benefited by that. And certainly if there are disputes about what the scope of the government production would have to be, it is helpful to try and sort those out.

I went along with the parties' suggestions for the pretrial schedule in this case. The parties didn't provide for the reciprocal discovery by the defense. If there was a dispute about that in setting the schedule before trial, and the defendant said, We don't have to do that, we don't know whether we are going to be producing witnesses or not, I would have agreed. So you don't have a date for the reciprocal defense production because the parties didn't provide for it. If there was a dispute before trial, you wouldn't have had it either. Mr. Klotz says he is not going to do that, he is not going to actually put on a case and reserve reciprocal discovery until the witness has completed direct. That's good, because we don't want to keep the jury waiting, and we would rather not have to make decisions about how much time is necessary to look over the reciprocal discovery and prepare for the cross of the witness.

So I urge you to try and work that out, and if I have to decide any motion with respect to what the scope of the production is, of course, give it to me.

We have another conference, don't we, scheduled?

MR. KLOTZ: We do not. That was on our schedule, to ask your Honor for a convenient date.

THE COURT: Sure. I have to have a final pretrial conference to dispose of issues like *voir dire* and all. Refresh my recollection on the trial date.

MR. KLOTZ: The trial date is October 21, and we were thinking that a date sometime at the beginning of the preceding week would be ideal.

THE COURT: Yes. I will probably actually be almost surely on trial. I start another trial, which is only supposed to last about a week, on October 10. So let's say final pretrial conference -- I alert you to the fact that I may have to delay the trial a week to begin if the other trial is still going on, but it shouldn't be more than a week. You will go right after the other trial is finished. So let's say a final pretrial conference October 15 at 4:30 p.m., and I would go over with you trial rules and *voir dire*.

In preparation for that, if you haven't already done it, you should get my trial rules.

MR. KLOTZ: Yes, your Honor.

THE COURT: And you should get my jury rules. And if you haven't already gotten them, Mr. Fletcher will give them to you and be prepared to e-mail them to you. I use the struck jury panel.

Okay?

MR. KLOTZ: Yes, your Honor.

THE COURT: Anything else?

MR. HART: No, your Honor.

MR. KLOTZ: The very last issue is, we filed the motion about customer testimony originally in the public record, and the government asked that we refile it under seal, and we don't think it was required to be filed under seal. Personally, I don't think any of us care whether it is filed under seal or not, but in general I'm inclined to think it is a nuisance to have to worry about filing documents under seal, and I don't understand why this would be an exception.

THE COURT: That was the most recent motion?

MR. KLOTZ: Yes.

THE COURT: Yes.

MR. KLOTZ: Yes. We attached to our motion a couple of government interview memos that otherwise would have been covered by the confidentiality order which expressly says you can use any of this to make court filings.

MR. HART: Yes, your Honor. The reason why we made such a request is because we view the information in those 302s to be personal in nature. If they were found on the public record -- we don't know who is following the docket -- they could contact those individuals. So out of an abundance of caution, to protect privacy, we would request them to be filed

under seal.

THE COURT: I will leave it under seal. It was filed under seal, right?

MR. KLOTZ: Yes, we refiled it, your Honor.

THE COURT: Okay. Anything else?

MR. HART: No, your Honor.

MR. KLOTZ: No, your Honor.

THE COURT: All right. Good to see you all.

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